Supreme Court, U.S.
FILED
OCT 14 1998
OFFICE OF THE CLERK

No. 98-432

In The

Supreme Court of the United States

October Term 1998

NICK PARRINO, as Administrator, etc.,

Petitioner,

vs.

FHP, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. DATO
(Counsel of Record)
BRIAN P. BARROW
O'FLAHERTY, CROSS, MARTINEZ, OVANDO & HATTON
222 South Harbor Boulevard, Suite 600
Anaheim, California 92805-3701
Telephone (714) 533-3373

Attorneys for Respondents Friendly Hills Healthcare Network, Friendly Hills Medical Group, and Jeffrey Wolf, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

QUESTIONS PRESENTED

1. Should certiorari be granted to address the propriety of the court of appeals' disposition of a cause of action for fraud in the inducement that was not alleged against these answering respondents?

2. Should certiorari be granted to address the question of whether the Employee Retirement Income Security Act (ERISA) preempts a state statute when that statute had not taken effect at the time of the alleged acts of the respondents and, in any event, would not apply to those alleged acts by the statute's own terms?

CORPORATE AFFILIATIONS OF RESPONDENTS FRIENDLY HILLS HEALTHCARE NETWORK, ET AL.

The parent corporation for respondents Friendly Hills Healthcare Network and Friendly Hills Regional Medical Center is Caremark International. The parent corporation of Caremark International is MedPartners, Inc. Both Caremark International and MedPartners, Inc. have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE AFFILIATIONS OF RESPONDENTS FRIENDLY HILLS HEALTHCARE NETWORK, ET AL..... ii

STATEMENT OF THE CASE..... 1

A. Introduction..... 1

B. The Facts..... 2

C. Proceedings Below 2

REASONS WHY THE PETITION SHOULD BE DENIED 4

I. Issue "A" of Parrino's Petition Does Not Involve Friendly Hills 4

II. Parrino Has No Standing to Assert Issue "B" of His Petition and, in Any Event, the State Statute Raised in Issue "B" Does Not Apply to the Alleged Acts of Respondents 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co., 514 U.S. 645 (1995) 7

Parrino v. FHP, Inc., 146 F.3d 699 (9th Cir. 1998) 2, 3, 4, 7

CONSTITUTION

California Constitution, article IV, section 8 5

STATUTES

California Civil Code sections 3427 et seq. 5

Title 29, United States Code, sections 1001 et seq. 1

RULES

Federal Rules of Civil Procedure, Rule 12(b)(6) 3

Supreme Court Rule 10 1

OTHER AUTHORITY

Review of Selected 1994 Legislation 26 Pacific Law Journal 729 (1995) 6

STATEMENT OF THE CASE

A. Introduction

Nick Parrino brings this petition against FHP and Friendly Hills,[1] insisting that his state causes of action for fraud and commercial blockade are not preempted by ERISA (29 U.S.C. §§ 1001 et seq.). Review by this court, however, is only appropriate when petitioner presents "compelling reasons." (Sup. Ct. Rule 10.) This case presents no such reasons.

Moreover, Parrino fails to mention a number of key facts in his petition. The first is that Friendly Hills was never named as a defendant in the cause of action for fraud in the inducement. It follows that Parrino's first ground for certiorari does not even apply to Friendly Hills.

As for his other ground, Parrino misleads this court in two ways: (1) the commercial blockade statute did not take effect in California until after the events of this case took place; and, (2) the California Legislature intended the statute to prevent physical blockade of medical facilities where abortions are performed. It was not intended as a means for recovery due to alleged delay of medical treatment by ERISA plan provider. Given these facts, as well as the preemptive effect of ERISA, this case fails to

---

[1] "FHP" collectively refers to respondents FHP, Inc., FHP Healthcare, aka FHP Value Plan, FHP Administrators, and Rem Almirante, M.D. "Friendly Hills" collectively refers to respondents Friendly Hills Healthcare Network, Friendly Hills Medical Group, and Jeffrey Wolf, M.D.

present any compelling reasons to justify granting certiorari. Parrino's petition should be denied.

B. The Facts

Stephen Parrino subscribed to a group health plan administered by FHP. His employer, Parrino Trucking, Inc., secured the plan for the benefit of its eleven employees. Parrino Trucking paid for each employee's coverage under the plan. Friendly Hills provided the medical care under the plan. In October 1993, Friendly Hills physicians diagnosed Parrino with a cancerous brain tumor. They referred him to Loma Linda University Medical Center for surgical removal of the tumor. After the surgery, they recommended "proton-beam therapy" in order to reduce the chances of reoccurrence. App. 4a-5a; *Parrino v. FHP, Inc.*, 146 F.3d 699, 702 (9th Cir. 1998).

FHP initially declined to provide the therapy on the grounds that it was experimental and unnecessary. Upon further review approximately two months later, however, FHP approved the therapy. Shortly thereafter, Friendly Hills doctors diagnosed Parrino with another tumor. Although the surgeons at Loma Linda performed a second surgery, the new tumor could not be safely removed. App. 5a; 146 F.3d at 702.

C. Proceedings Below

Two days before he died, Parrino filed an action in California state court. His complaint alleged that FHP's delay in approving the proton-beam therapy caused his

second tumor. It named Friendly Hills in causes of action for civil conspiracy, interference with access to health care, spoliation of evidence, and general negligence. Parrino also sued FHP for fraud in the inducement and breach of the implied covenant. (9th Cir. Excerpts of Record at 19-68.) The complaint failed to mention the fact that Parrino's health care plan had been procured by his employer.[2]

FHP and Friendly Hills removed the action to the United States District Court on the ground that it was completely preempted by ERISA. After denying Parrino's motion to remand, the district court dismissed the entire complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Parrino appealed the district court's order to the Ninth Circuit. Citing circuit precedent (as well as authority from this court), the court of appeals affirmed the district court's dismissal of the case. The Ninth Circuit determined that state causes of action based on allegedly improper handling of medical benefit claims under an ERISA plan are preempted. Applying the facts, the court found that Parrino's causes of action against Friendly

---

[2] It is ironic that Parrino bases his petition in part on a cause of action for fraud in the inducement. Parrino (through his attorneys) failed to disclose in his complaint that his employer provided his health benefits. As the Ninth Circuit recognized, this failure was an attempt to artfully plead his complaint "so as to omit facts that include federal jurisdiction." App. 9a; 146 F.3d at 704.

Hills were all "predicated upon alleged improper handling of his claim for treatment" and were therefore preempted.[3]

Parrino now brings this petition claiming this court should grant certiorari because: (1) his cause of action for fraud in the inducement is not preempted by ERISA; and, (2) the state police power underlying California's commercial blockade statute likewise cannot be preempted by ERISA.

REASONS WHY THE PETITION SHOULD BE DENIED

I

Issue "A" of Parrino's Petition Does Not Involve Friendly Hills.

Parrino's first ground for certiorari (Issue "A") does not apply to Friendly Hills. It focuses on the question of whether a state cause of action for fraud in the inducement is preempted. Parrino did not, however, name Friendly Hills as a defendant in this fraud cause of action. Friendly Hills only provided the medical care in this case; it did not have any involvement in the alleged misrepresentations that Parrino claims induced his employer to purchase medical care services through FHP. In short,

---

[3] The dissenting opinion below was based on the question of whether removal was proper. App. 14a-16a; 146 F.3d at 707 (Fernandez, J., dissenting). Parrino does not raise this issue in his petition, and it thus is not before this court. Interestingly, Judge Fernandez observed in his dissent: "I would be inclined to agree that Parrino should not ultimately prevail." App. 14a; 146 F.3d at 707.

Parrino did not name Friendly Hills in the fraud claim because Friendly Hills had no involvement other than to provide the actual medical care. The denial of certiorari on this ground with regard to Friendly Hills requires no further analysis.

II

Parrino Has No Standing to Assert Issue "B" of His Petition and, in Any Event, the State Statute Raised in Issue "B" Does Not Apply to the Alleged Acts of Respondents.

Parrino's second ground for certiorari at least applies to Friendly Hills. Nevertheless, it suffers from factual and legal flaws that prevent it from serving as even a tenable (let alone compelling) reason for the granting of certiorari.

Parrino claims that the Tenth Amendment prohibits a federal statutory scheme such as ERISA from preempting California's "commercial blockade" laws, California Civil Code §§ 3427 et seq. But he fails to advise this court that the state statutes did not take effect until January 1, 1995. See Cal. Const., art. IV, § 8.[4] The incidents described in Parrino's complaint all took place in 1994, prior to the

---

[4] Article IV, section 8, subdivision (c) of the California Constitution sets forth the general rule in California that, absent emergency legislation (and there was none here), statutes take effect on January 1 following the date the legislation is signed by the governor. The commercial blockade statutes were all enacted in 1994 (see App. 26a-28a), and thus became effective January 1, 1995. By that time, however, all of the events alleged in Parrino's complaint had already taken place.

effective date of the statutes. As such, the "tort" of commercial blockade did not even exist at the time Parrino claims the acts occurred. Moreover, nothing contained in the statutes make them retroactive to events occurring before the new laws' operative date. (See App. 25a-27a.)[5]

Furthermore, "commercial blockade" is defined in California Civil Code section 3427.1 as "intentionally prevent[ing] an individual from entering or exiting a health care facility by *physically obstructing* the individual's passage or by disrupting the normal functioning of a health care facility." (Italics added.) App. 27a. Parrino never alleged in his complaint that defendants physically obstructed him. Instead, Parrino alleged that FHP and Friendly Hills "disrupted the normal function of the Loma Linda University Medical Center health care facility by intentionally rendering or attempting to render said health care facility unavailable or unusable to [Parrino] and his health care providers. . . . " (9th Cir. Excerpts of Record at 42.)

This is not what the California Legislature had in mind when it enacted the commercial blockade statutes. The legislation was intended to deal with situations where the operation of a health care facility, such as an abortion clinic, was physically interfered with, not where a patient alleges that benefits due him under an employer-provided health plan were improperly withheld or delayed. *Review of Selected 1994 Legislation*, 26 Pac.L.J. 729 (1995).

---

[5] Parrino never attempted to refute Friendly Hills' argument below that the commercial blockade statutes had not yet taken effect at the time of the acts alleged in the complaint.

Even if Parrino could somehow overcome all of these standing problems, his argument would still fail. As the Ninth Circuit here correctly recognized, ERISA preempts " 'state laws providing for alternative enforcement mechanisms' for ERISA plan benefits, as well as 'state laws that mandate[ ] employee benefit structures or their administration.' " App. 11a; 146 F.3d at 705, quoting *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995). Parrino's cause of action for commercial blockade is based on his allegation that defendants failed to properly process his health plan benefits claim. It seeks an "alternative enforcement mechanism" for the alleged denial of health plan benefits. As such, it is preempted by ERISA.

CONCLUSION

The decisions rendered below are free from error. Parrino presents no persuasive (let alone compelling) reason that would justify intervention by this court. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

O'Flaherty, Cross, Martinez, Ovando & Hatton
Robert M. Dato
Brian P. Barrow

Attorneys for Respondents

Friendly Hills Healthcare Network,
Friendly Hills Medical Group,
and Jeffrey Wolf, M.D.